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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937.

Nos. 779, 780, 781.

GUY T. HELVERING, Commissioner of Internal Revenue,

v.

PHILIP L. GERHARDT,

(And Related Cases)

BRIEF ON BEHALF OF THE UNDERSIGNED STATES AS
AMICI CURIAE.

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No. 779.

GUY T. HELVERING, Commissioner of Internal Revenue,
Petitioner,

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PHILIP L. GERHARDT,

Respondent.

No. 780.

GUY T. HELVERING, Commissioner of Internal Revenue,
Petitioner,

v.

BILLINGS WILSON,

Respondent.

No. 781.

GUY T. HELVERING, Commissioner of Internal Revenue,
Petitioner,

v.

JOHN J. MULCAHY,

Respondent.

**MOTION FOR LEAVE TO ARGUE ORALLY AND FILE
A BRIEF AMICI CURIAE.**

To the Honorable the Supreme Court of the United States:

Now come the undersigned, The State of New York, by its Attorney General John J. Bennett, Jr., through Henry Epstein, Solicitor General, as Counsel; The State of New

Jersey, by its Attorney General, David Wilentz; The State of Alabama, by its Attorney General, Albert A. Carmichael; The State of California, by its Attorney General, U. S. Webb; The State of Connecticut, by its Attorney General, Charles J. McLaughlin; The State of Delaware, by its Attorney General, P. Warren Green; The State of Indiana, by its Attorney General, Omer S. Jackson; The State of Louisiana, by its Attorney General Gaston L. Porterie, and by Joseph A. Loret, Special Assistant Attorney General; The Commonwealth of Massachusetts, by its Attorney General, Paul A. Dever; The State of Michigan, by its Attorney General, Raymond W. Starr; The State of Mississippi, by its Attorney General, Greek L. Rice; The State of Montana, by its Attorney General, Harrison J. Freebourn; The State of Nevada, by its Attorney General, Gray Washburn; The State of New Hampshire, by its Attorney General, Thomas P. Cheney; The State of North Carolina, by its Attorney General, A. A. F. Seawell; The State of Ohio, by its Attorney General, Herbert S. Duffy; The State of Oregon, by its Attorney General, I. H. Van Winkle; The Commonwealth of Pennsylvania, by its Attorney General, Charles J. Margiotti; The State of Rhode Island, by its Attorney General, John P. Hartigan; The State of Utah, by its Attorney General, Joseph Chez; The State of Vermont, by its Attorney General, Lawrence C. Jones; The Commonwealth of Virginia, by its Attorney General, Abram P. Staples; The State of Washington, by its Attorney General, G. W. Hamilton; The State of Wisconsin, by its Attorney General, Orland S. Loomis; and The State of Wyoming, by its Attorney General, Ray E. Lee, and pray leave to argue orally, for a period of

thirty minutes, in behalf of the position of the Respondents in the above cases, and to file the subjoined brief in support thereof.

The contentions made in these cases by the Commissioner of Internal Revenue are of vital concern to the States. Your Amici consider it fundamental that the Federal Government cannot interfere with nor burden the States or their instrumentalities in the exercise of their governmental powers and duties. There are no powers or duties higher in their governmental character than are the construction of bridges and highways and the development of ports and harbors. The decisions of this Court would appear to be conclusive as to the governmental character of state action in those fields, and have unanimously reaffirmed the constitutional necessity of state immunity from Federal taxation as essential to the preservation of our dual form of government.

In addition, these cases are an attack upon the right of sovereign States to cooperate by Compact in the solution of their common problems, free from the burden and interference of Federal taxation. As such, they cannot be construed otherwise than as an attack on the sovereignty of your Petitioners.

Your Amici therefore urge the importance of the decision in these cases, not only to the State of New York and New Jersey, but to every state in the Union. Each of your Petitioners has substantial interests at stake which are likely to be affected by the decision of the Court herein, both by reason of the fact that their sovereignty is necessarily affected and, more particularly, because your Amici, in the solution of their bridge, highway, canal, irrigation, sanitation, park, port and harbor, and similar governmental prob-

lems, have availed themselves of the efficiency and convenience of similar state or bi-state agencies. Indeed, the Commissioner's attack in these cases goes directly to the governmental character of such functions, even when carried out by the States themselves.

A holding in favor of the Commissioner's contentions here would tend to destroy the usefulness to all of the States, of the Authority or Commission method of achieving sound and efficient results and would adversely affect the political subdivisions and municipal corporations of the States in the performance of what have heretofore been regarded as normal and vital governmental functions.

The use of such state agencies and instrumentalities in expediting public work, the fundamental principle of American government, that of State sovereignty, the public credit of your Petitioners and that of all the other states in the Union—all of these matters of vital governmental importance—must be affected by the Court's decision in these actions. With all due restraint, your Petitioners feel that the brief submitted here by the Federal government is a shocking attack upon the rights of the States.

WHEREFORE, the States of New York, New Jersey, Alabama, California, Connecticut, Delaware, Indiana, Louisiana, Massachusetts, Michigan, Mississippi, Montana, Nevada, New Hampshire, North Carolina, Ohio, Oregon, Pennsylvania, Rhode Island, Utah, Vermont, Virginia, Washington, Wisconsin, and Wyoming ask leave to be heard orally in the argument of the above cases, and pray that this Honorable

Court will accept the following brief for consideration. In addition to joining in the brief of all of the undersigned States, California also prays leave to submit the separate concurring memorandum which follows at page 50.

Dated: March, 1938.

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**BRIEF ON BEHALF OF THE UNDERSIGNED STATES AS
AMICI CURIAE.**

Statement.

In these cases the Commissioner of Internal Revenue is attempting to tax a bi-state instrumentality created solely for the planning and development of a port district, its highways and waterways.

The Court has itself made clear the duty of the States to defend themselves against such attacks. In *Willcuts v. Bunn*, 282 U. S. 216, in rejecting a claim of immunity, the Court said (p. 233) :

"No state has ever appeared at the bar of this court to complain of this federal tax."

Your Amici desire, by their appearance here, to reject any such inference in these cases.

While the following brief is necessarily confined to the record here, the decision may well be controlling as to the immunity of agencies in all of the States, and, indeed, as to the States themselves, in the development of their ports, bridges, highways, and in similar functions.

The Port Authority was created by an interstate Compact of April 20, 1921, between the States of New York and New Jersey, pursuant to the Acts of their respective legislatures (Chapter 154, Laws of New York, 1921 and Chapter 151, Laws of New Jersey, 1921); consented to by joint resolution of the Congress of the United States (Public Resolution No. 17—67th Congress, S. J. Res. 88). This Compact of 1921, by its very terms, supplemented the earlier Compact of 1834 between the two States.

It is the position of your Amici, the States submitting this brief, that the work of a state agency such as the Port Authority, in developing the common port and harbor of the States of New York and New Jersey and in providing highway connections between the two States, is the very highest type of sovereign function and, as such, immune from Federal taxation. The argument of the Government goes to the extent of holding that since Congress has the paramount power to regulate interstate commerce, every activity in this field is subject to the taxing power of the Federal Govern-

ment. Such an argument, of course, makes it immaterial whether the property or enterprise is carried on by the States through a municipal corporation such as the City of New York, or through a corporate instrumentality such as The Port of New York Authority, or indeed by the State itself.

There is here no question of an extension of the doctrine of constitutional immunity. This case is definitely not within the "zone of debatable ground" recently referred to by the Court. The decisions of this Court in *New York ex rel. Rogers v. Graves*, 299 U. S. 401 and *Brush v. Commissioner*, 300 U. S. 352, are conclusive as to the governmental character of highway and waterway development. Indeed, the Port Authority satisfies even the requirement of governmental status expounded by the opinion of the dissenting Justices in the latter case. So too, the Port Authority is immune under the principles so recently reaffirmed by this Court in *James v. Dravo Contracting Company*, 82 L. Ed. Adv. Ops. 125, and in *Helvering v. Therrell*, 82 L. Ed. Adv. Ops. 537.

While, as we have stated in the foregoing Petition, all the States appearing here have substantial interests in these cases, your Amici, the States of New York and New Jersey, are the principals of the Port Authority. They hold direct title to much of the property it operates, directly control its revenues, and have the joint and ultimate ownership of all its bridges, tunnels and port facilities.

However, every State in the Union is performing functions similar to those of the Port Authority in the development of bridges, highways, irrigation and sanitation projects, parks, ports, and harbors and related fields of necessary governmental activity. In the State of New York, for instance, there is a Department of Public Works, including among its

five divisions a Division of Canals and Waterways and a Division of Highways.¹ The functions of these Divisions in developing and operating waterway facilities, including the Erie Canal system, with its docks and terminals, all owned by the State, and in the construction and operation of State bridges and highways, are in all respects the same as the functions exercised by the States through the Port Authority. Their Superintendent is appointed by the Governor just as is a Commissioner of the Port Authority. The Department of Public Works is one of the eighteen Departments which comprise the Government of the State of New York.² Since the whole contention of the Commissioner in these cases *goes to the nature of the function*, no distinction whatever can be made between a Federal Tax on a State Superintendent of Public Works and a Federal tax on an employee of a municipal corporate instrumentality of the State.

From the viewpoint of your Amici this case was of most serious consequence even before the service of the Federal Government's brief. When, for the first time in this Court, the Government took the flat position that the revenues of a state agency are taxable, the case presented an issue such as the states of this Union have seldom had to face in the last century and a half. For, as we shall show, the revenues which the Federal Government seeks to tax belong entirely to the States of New York and New Jersey. They are devoted entirely to the liquidation of the debts which the two States

¹ Section 10, Public Works Law, McKinney's Consolidated Laws of New York.

² State Department's Law, Chapter 78, McKinney's Consolidated Laws of New York.

have directed their agency to incur in the construction of port bridges, tunnels and terminals.

Summary of Argument.

I. The necessities which brought about the creation of the Port Authority demanded joint governmental action by the States of New York and New Jersey. Those two States are here in fulfillment of the pledge of their Compact of 1921 to carry on "faithful cooperation in the future planning and development of the port of New York." They are joined here by their sister States which, facing similar necessities, have always exercised the governmental functions which the Federal Government now seeks to tax. The governmental problems which brought about the creation of the Port Authority are the problems of a district historically, commercially and economically one, but divided by a political boundary line. The problems of port and highway organization in this district put upon the States tremendous financial burdens, and imposed grave governmental duties affecting the health and welfare of millions of people in both states.

A reversal of the decisions below would destroy the usefulness of the authority method of achieving governmental results and would permit direct interference with the states in the performance of what have heretofore been regarded as normal and vital governmental functions.

II. The governmental character of the functions exercised by the Port Authority is established both from the purposes of its creation and from the traditional exercise of those functions by governments generally. Its functions of port and highway development therefore meet the tests for im-

munity considered and followed by this Court in *New York ex rel. Rogers v. Graves*, 299 U. S. 401 and *Brush v. Commissioner*, 300 U. S. 352.

III. The Port Authority is an integral part of the governments of the States of New York and New Jersey. It was created by Compact and is clothed with attributes of state sovereignty.

IV. A tax upon the Port Authority would impose a direct monetary burden upon the States of New York and New Jersey themselves. Its revenues belong to those two States and are disposed of only in accordance with the statutory directions of the States. The States have made outright appropriations of almost \$3,000,000. to the Port Authority projects; they have made advances of over \$18,000,000; they have pooled their revenues for the effectuation of a comprehensive plan of port and highway development. The Government obviously treats this case as the first step toward taxing those state revenues. The tax burden sought to be imposed in these cases, in increasing the operating expenses of the Port Authority, will either indefinitely postpone, or else forever prevent the return of the States' advances for these port projects.

POINT I.

The governmental necessity for the creation of the Port Authority.

In all of the States, it has been necessary, in the interest of governmental progress and efficiency to carry on certain state functions through instrumentalities created for

that purpose. The necessities for governmental action which brought about the creation of The Port of New York Authority are typical of the problems facing all of your Amici.

The States of New York and New Jersey are here in fulfillment of their pledge of "faithful cooperation in the future planning and development of the port of New York," Compact of April 30, 1921, Article I (Stipulation, Ex. E, p. 14). The joint agency which the two States created by that Compact, and the Comprehensive Plan of port and highway development which they entrusted to that agency, are here under an attack (Record, folio 311;¹ Government's Brief, pp. 45, 47, 56) which, if carried to its ultimate objective, may bankrupt the agency and destroy the plan.

By way of contrast with this cooperation between those two States, their early history reveals a record of distrust, rivalry and open reprisal over and around the waters of New York harbor which too often characterized their relations in the past, and which compelled their resort to Compact. Similar controversies between the states have arisen throughout the country and, happily, are being peaceably disposed of by interstate compact. Yet the Government argues (Brief, Pt. II) that the very fact of entry into the Compact makes a bi-state agency taxable!

The early conflicts between New York and New Jersey arose out of the existence of a boundary line, separating the two States politically, but in actual effect dividing a district historically, commercially and economically one. Thus the great case of *Gibbons v. Ogden*, 9 Wheat. 1, arose out of a

¹ All Record citations which follow refer to the original page numbers of the Circuit Court Record, which appear in the Transcript of Record here as marginal numbers similar to folio numbers. For convenience, "Record, folio" will hereafter be cited "Rec. f."

controversy between the two States over their jurisdiction in the Port of New York. The monopoly granted to Livingston and Fulton controlling steamboat traffic over New York waters (New York Act of April 5, 1803) brought a wave of indignation from New Jersey. New York enacted that, if anyone should navigate a steamboat within her jurisdiction without a license, the parties aggrieved might seize the boat and its equipment. New Jersey, in retaliation, ordered that if anybody seized a boat belonging to a citizen of New Jersey lying upon the waters between the two States, the owners might seize any New York boat found in New Jersey waters. It seems hard to realize today, but the two States were actually on the verge of war as a result of these and similar incidents.

Another conflict over their jurisdiction in the port district arose in 1826 when a Deputy Sheriff of Richmond County, New York, was arrested and indicted by New Jersey authorities for serving process within the jurisdiction of New Jersey, New Jersey claiming ownership of Staten Island (Stip. Ex. B, p. 42).

Finally, after a long series of such irritating incidents, came a course of negotiations between the States, culminating in the Treaty of 1834, setting up the boundary line between the two States as it is now fixed and apportioning their jurisdiction over the waters and islands of the harbor (Stipulation Exhibit B, pp. 42-44).

At about the time of this Treaty, however, the foundation was being laid for another great conflict. The population of the Port District continued to mount, an ever increasing volume of industrial commerce centered upon New York City, and the harbor became the terminus of the great network of railways which spread out across the continent.

However, the harbor waters prevented the entrance of the railroads into the City itself, and necessitated expensive and wasteful ferriage across the river and bay.

This finally led to a claim that an equality of railroad rates to both sides of the harbor was prejudicial to the interests of New Jersey, and resulted in the *New York Harbor Case*, 47 I. C. C. 643 (Rec. f. 47, 278-279).

The case caused widespread public discussion of the problem of port organization. As a fortunate result, the proceeding had an educative influence upon all those concerned with the future development of the port district (Rec. f. 47, 279). Even while the case was pending, there gradually emerged the conception that whatever the States might gain through the litigation, they could gain more through interstate cooperation.

This conviction culminated in the creation of the Port Authority, in 1921, by a new interstate Compact amending and supplementing the Treaty of 1834. During the same period the two States had begun to cooperate in the construction of the Holland Tunnel, paid for out of their own funds and through the medium of coordinate state commissioners (Rec. f. 299, 303).

Through such cooperation the two States went straight to the heart of these interstate differences—the inevitable conflicts of a great economically unified harbor area, *divided by a political boundary line*.

No one can read the history of the deliberations of the two States, which brought about the Compacts creating the Port Authority (Rec. f. 46-48, 278-284), and the Holland Tunnel Commissions (Rec. f. 299, 300), without becoming thoroughly convinced that here again were necessary acts of sovereign cooperation covering that very type of govern-

mental dispute over boundaries, commercial preferences and trade routes, for want of which today, in the larger theatre of international affairs, the peace of the world is constantly in danger.¹

The precedent for this type of interstate treaty or compact may be found in the early recognition of the importance of preserving peaceable relations between two neighboring colonies. In 1785, after years of constant bickering between Virginians and Marylanders over traffic on the Potomac, Commissioners from the two States met at Mount Vernon. Their deliberations resulted in the "Mount Vernon Compact" fixing the rights of those two States in their common waterways, ports and harbors, and ultimately led to the adoption of the Federal Constitution itself.²

The governmental problems which faced the States of New York and New Jersey in the development of the Port of New York are thoroughly set forth in the Record in these cases and in the Respondents' Brief. Those grave public necessities, touching the health and welfare of the millions of people of the Port District are detailed in the Report of 1919 of the Bi-State Legislative Commission (Stip. Ex. B; see particularly pp. 1 to 40). They are summarized in the

¹ The language of this Court in *Helvering v. Therrell*, 82 L. Ed. Adv. Ops. 537, emphasizes the importance of the rule of immunity in preventing just such conflicts between the State and Federal Governments:

"The Constitution contemplates a national government free to use its delegated powers; also state governments capable of exercising their essential reserve powers; both operate within the same territorial limits; consequently the Constitution itself, either by word or necessary inference, makes adequate provision for preventing conflict between them."

² See Burton J. Hendrick, *Bulwark of the Republic* (1937), pages 11 and 12; also pages 52 to 55.

Findings of the Court below (Rec. f. 47-48). We need only point out here that the problem of port development faced by the two States in 1916 was regarded as one of the most compelling governmental problems which ever faced the people of that area. The density of population, the enormous concentration of commerce, the resulting traffic congestion, all called for the immediate development of efficient port and highway facilities. The entire freight handling system of the port area was antiquated. Waterfront properties were overrun with wasteful railroad pier stations to the exclusion and loss of steamship traffic. No adequate provision for the motorization of vehicular traffic had been made. The streets and highways of the Port District had become so clogged and congested that business was becoming paralyzed and the streets had become a menace to public health and safety. The picture was one of confusion, economic paralysis and colossal waste which called upon the governments of two States to act and to act promptly.

The States met their responsibility in this situation. They devised a method, and surmounted the problem of the enormous tax burden that such a program would ordinarily have entailed, by the creation of a bi-state, self-liquidating public agency which they designated their "municipal corporate instrumentality." Through this instrumentality they brought into being the vehicular bridges and tunnels, the coordinated freight handling facilities and terminals, the express highways, and the modern port facilities which the solution of the problem demanded.

When the Commissioner of Internal Revenue attempts to tax the Port Authority, *because of its creation by Compact*, he challenges the power of all of the States in the Union to resort to the cooperative solution by treaty of their joint and

mutual problems. For obviously they cannot enter into Compacts if that very act gives rise to a tax liability. The States are here to preserve such instruments.¹

The effect of a decision in these cases in favor of the contention of the Commissioner would be to prevent or deter the states from using the municipal corporate method of carrying out necessary governmental works. Prior to the creation of the Port Authority, the customary method of carrying out governmental projects was through departments or commissions, payment being made directly out of treasury funds—that is, tax funds or the proceeds of bond issues. To this single fact may be attributed much of the enormous growth and heavy burdens of state and municipal indebtedness. The Authority method is a necessary departure. Under it one or more states establish an agency of government which is charged with the effectuation of a public project *and the collection of tolls or charges from the users thereof to liquidate the cost of the enterprise.* The tax is on users and not upon general taxpayers. This method was put on trial in the case of The Port of New York Authority. Its success has caused its use to become widespread.² By this plan sovereign property and revenues are allocated to specific works and a part of the public debt is insulated

¹ The Palisades Interstate Park Commission of New York and New Jersey is a nice instance of the necessity for such compacts. There were originally two such Commissions, one in each state. The matter of police jurisdiction, of continuity of title and other duplications of administration,—all led inevitably to the necessity for a compact. The reasons are cogently stated in the recent report of the Congressional Committee recommending consent. (H. R., Report No. 1382. 75th Cong.—1st Sess.)

² See Wilson Chamberlain, "I'll Pay My Own Way—Tolls Take the Strain off Taxes," The Forum, April 1938, p. 247.

from the general tax burden. This is the method under attack here. Must the States give up their freedom to select such instrumentalities and return to a method involving greater tax and debt burdens? If the construction of necessary public works is to go forward today, this authority method must be retained unimpaired.

There are in all the States municipal corporate agencies and districts of varied character, self-liquidating either wholly or in part. These governmental agencies all perform what heretofore have been regarded as normal and vital governmental functions. Among these functions are those of water supply, sewerage disposal, fire protection, paving, parks, hospitals, canals, highways, bridges, vehicular tunnels, education, parkways, irrigation, drainage, and port and harbor development.

These projects cannot be carried forward on a sound, self-liquidating basis if they are to be burdened by federal taxation. They are financed and have been financed for the past two decades, on the assumption of immunity, whether carried on by the states themselves or by their agencies. Certainly it has always been supposed that the states could perform such functions without federal tax interference. And their freedom to select such instrumentalities as may most efficiently accomplish their governmental purposes has been emphasized by this Court time and time again.

POINT II,

The Port Authority is engaged in an essential governmental function.

The States submit that the immunity of the Port Authority in no way curtails the Federal taxing power. That power has *never* extended to port, harbor, bridge and highway development by the States. There is, therefore, no question here of an extension of a doctrine of Constitutional immunity to "businesses which constituted a departure from *usual* governmental functions" (*Helvering v. Powers*, 293 U. S. 214, 225; *Brush v. Commissioner*, 300 U. S. 352, 361). Certainly it cannot be seriously debated that governments, ancient and modern, have treated the construction and operation of their highways and bridges, and the development and control of their ports, as among their high sovereign duties. Even the Petitioner admits this (Brief, p. 63). Here is no question, such as was raised in the *Brush* case, as to whether the states might, with immunity, properly take over a function which had largely been exercised by private utility companies in many parts of the country. Here is no question, as there was in the *Rogers* case, as to whether the Federal Government might supplant the private ownership of a New York corporation in the operation of a railroad, hotels and steamships. If this Court was of opinion that the functions there were governmental, then *a fortiori* the functions of the Port Authority are within "those duties which the framers intended each member of the Union would assume in order adequately to function under the form of government granted by the Constitution." (*Helvering v. Therrell*, 82 L. Ed. Adv. Ops. 537.)

The method of analysis followed by this Court in *Brush v. Commissioner*, 300 U. S. 352, *New York ex rel. Rogers v. Graves* 299 U. S. 401 and *Helvering v. Therrell*, 82 L. Ed. Adv. Ops. 537, indicates two primary considerations or tests to be applied in determining the governmental character of a function exercised by a State agency. The *first* looks to the purposes for which the agency was established and the *second* considers the tradition and history of government exercise of that function. The States submit that the Port Authority meets both tests.

First. The record establishes that The Port of New York Authority was created for the following sovereign governmental purposes: preservation of peaceful relations between New York and New Jersey, the planning and development of the Port of New York District, and the preservation of the health, safety and welfare of its inhabitants.

These purposes are all set forth in Point I, where we have shown the necessities for State action creating the Port Authority. They are stated in the Report of the New York, New Jersey Port and Harbor Development Commission, which studied the port problem (Stip. Ex. B, pp. 1 to 38). As appears from that study and from the whole Record here (Stip. Rec. f. 11, 278; Findings, Rec. f. 47, 48, 62 *et seq.*), the two States felt it necessary to take drastic steps to insure the solution of a port problem which was threatening the supply of food, fuel and other necessities of life to millions of their inhabitants, and lowering their standard of living. They therefore adopted a Comprehensive Plan of port development, including necessary bridge and tunnel connections over and under the harbor waters, linking their highway systems. We need not amplify the governmental

duties called into being by these conditions, nor the governmental character of the functions which were accordingly exercised. They should be decisive here, as they were in the *Brush* and *Rogers* decisions.

Second. The historical and traditional governmental character of the functions exercised by the Port Authority, are sufficiently indicated, for the purposes of this brief, in the following precedents. They are more thoroughly developed in the Respondent's Brief.

Though, of course, the interstate toll bridges and tunnels which have been constructed by the Port Authority are state highways in every sense, your Amici wish to point out particularly that the Port Authority has spent approximately \$36,000,000 for the construction of connecting highways in New York and New Jersey, which are operated without toll or charge of any kind. (See Rec. f. 406-410, 469).

Thus, the New Jersey highways running westerly from the Lincoln Tunnel, were constructed by the Port Authority at a cost of \$19,864,000., raised by its own bond issues. They are to be given, in fee, to the New Jersey State Highway Department. These arterial highways include three-level safety intersections of unprecedented design. They extend for a distance of almost three miles across the Palisades, traversing three municipalities, connecting with and forming a part of the New Jersey-New York state-wide highway systems. In New York, reorganization of the City's street system, provided for under the Acts authorizing the construction of the Lincoln Tunnel, necessitated the construction of two entirely new avenues in Manhattan, both running from 34th to 42nd Streets and freely open to all city traffic. The cost of these

two avenues was \$7,133,000, all of which was borne by the Port Authority.

The public highways constructed in New Jersey to the west of the George Washington Bridge cost \$6,400,000. After their construction, the Port Authority conveyed them to the New Jersey State Highway Department which operates them as public highways without toll. On the New York side of the George Washington Bridge additions to the City's street system, carrying highway traffic across the entire Island of Manhattan, cost \$2,500,000. They were constructed by the Port Authority at its own expense and are likewise open to the public without toll.

This Court would seem to have upheld the governmental character of the Port Authority's functions in the construction and operation of bridge, tunnel and highway facilities. In *New York ex rel. Rogers v. Graves*, 299 U. S. 401, holding that such activities were an exercise of governmental functions, the Court said (p. 406) :

"The building and operation of a bridge or a road or a canal is not commerce in the substantive sense, but is the creation and use of a physical thing as a medium by and through which commerce is regulated, since such creation and use condition and facilitate transportation."

When in the *Rogers* case your Amicus, the State of New York, attempted to tax an employee of the Panama Rail Road Company, the Court unanimously upheld the governmental character of that company as an *incident* of the operation of a great Federal waterway and highway development. Here the States support the immunity of their agency engaged *directly* in the development of their waterways and highways. As indicated by the foregoing quotation from

the *Rogers* case, the Court itself has pointed out the identity between bridges, highways and canals. The States ask only reciprocity and equality of treatment.

Two months later, in *Brush v. Commissioner*, 300 U. S. 352, the Court reaffirmed its position as to the governmental nature of highway development. The Court there said (pp. 372, 373) :

"The state, for example, constructs and operates a highway. It may, if it choose, exact compensation for its use from those who travel over it (see *Bingaman v. Golden Eagle Western Lines*, 297 U. S. 626, 628) ; but this does not destroy the claim that the maintenance of the highway is a public and governmental function."

This Court has pointed out that it is the governmental duty of the States to assume the management and control of their port and harbor properties. *Illinois Central Railroad Co. v. Illinois*, 146 U. S. 387, 452, 453. In that case the court pointed out that as a matter of public policy it could not

"sanction the abdication of the general control of the State over lands under the navigable waters of an entire harbor or bay or of a sea or lake. Such abdication is not consistent with the exercise of that trust which requires the government of the State to preserve such waters for the use of the public. The trust devolving upon the State for the public, and which can only be discharged by the management and control of property in which the public has an interest, cannot be relinquished by a transfer of the property." (Italics ours.)

It would be futile to attempt to add anything to what the Circuit Court of Appeals for the Second Circuit said as to the historic governmental character of port development, in *Commissioner v. Ten Eyck*, 76 F. (2d) 515, 517, 518:

"Historically, port activities have been shown to be almost universally, directly subject to the supervision of agencies of government. * * *

"The necessity of a comprehensive plan for the organization and development of port facilities in the principal harbors of this country has been recognized, and steps have been taken to vest in the control of properly constituted governmental agencies the future development of many of its ports. A Bi-State Commission was appointed to consider the requirements of New York and New Jersey, clearly an effort within the sovereign prerogatives of the respective states. They joined in an agreement for the creation of a governmental agency and endowed that agency with adequate powers to carry out remedial measures for the alleviation of traffic congestions within, and further development of the facilities of, the Port of New York. It resulted in the creation of the Port of New York Authority. *This action was a recognition of the importance, as a governmental desire, of the proper development and operation of the Port of New York.* * * *

"Therefore, it is clear that ownership, control, and operation of port facilities are essentially and usually prerogatives of sovereignty; especially of the sovereignty of the constituent state governments of the United States." (Italics ours.)

Even in the *Brush* case below, 85 F. (2d) 32, 35, the Circuit Court in holding to the same views as were here expressed in the dissenting opinion, that municipal water supply was not governmental, *nevertheless upheld the immunity of port and harbor development* in the following language:

"Our decision in *Commissioner v. Ten Eyck*, * * * was controlled by the traditional supervision exercised by government over seaports and stands apart from the decisive features here."

The principles of constitutional immunity are expressly reaffirmed by the Court in the course of its opinions in

James v. Dravo Contracting Company, 82 L. Ed. Adv. Ops. 125, and in *Helvering v. Therrell*, 82 L. Ed. Adv. Ops. 537. We conclude that, within those constitutional principles, long established and so recently reaffirmed, The Port of New York Authority and its employees are engaged in essential governmental functions of the two States and are immune from Federal taxation.

POINT III.

Governmental relationship between the Port Authority and the two States.

The Government argues that, even if the functions of the Port Authority are immune, the Board and the Circuit Court below nevertheless erred in holding that the Port Authority functioned as an agency created by the States of New York and New Jersey, and that Congressional consent to the Compact destroyed the sovereign character of the States' action (Brief, Point II). Further, the Government declares that the existence of the Port Authority as "a separate corporate entity" shows that it was created "without reference to the normal governmental functions of either State." (Brief, p. 32).

In answer to the second of these two contentions your Amici submit that both in its creation and in its functions the Port Authority is in all respects the direct and governmental agency of the two States alone, completely integrated into the very machinery of their State governments.

In his opinion of November 10, 1925, the Honorable Charles Evans Hughes succinctly stated the considerations

that led him to the conclusion here reached by your Amici. He said:

"The Port of New York Authority created by the Compact is a public agency of the two States.

"The port authority is manifestly not a private agency. It is established for public purposes. These purposes relate to the development of terminal, transportation and other facilities of commerce in the port of New York. The port authority consists of Commissioners appointed in the manner defined by the legislatures of the two States; that is in the case of New York, by the Governor, with the advice and consent of the Senate, and in the case of New Jersey, directly by the legislature in the first instance and thereafter, as vacancies occur, by the Governor with the advice and consent of the Senate. The authority to be exercised, as shown by the Compact, the Comprehensive Plan, and the supplementary legislation, is a public authority; that is it is an authority granted by the legislatures and to be exercised on behalf of the public by representatives of the States.

* * *

"The immunity of the bonds from Federal taxation follows from the fact that, as already stated, the port authority is a public agency, a governmental instrumentality of the two States."

The States of New York and New Jersey established The Port Authority by treaty, declaring it to be "a body corporate and politic." (Rec. f. 45). They declared that:

"The port authority shall be regarded as the municipal corporate instrumentality of the two states * * *"¹

In the legislation directing the activities of the Port Authority, it is constantly referred to as a "body politic,"

¹ Chap. 43, Laws of New York, 1922, and Chap. 9, Laws of New Jersey, 1922. (Stip. Ex. E p. 44).

a "municipal corporate instrumentality," and as the "agency" of the two States for the effectuation of the pledge of cooperation in the Compact.¹ (Rec. f. 287).

Recently, in discussing the Buffalo and Fort Erie Public Bridge Authority, similarly described by the Legislature as "a municipal corporate instrumentality," the New York Court of Appeals referred to a list of state authorities, including the Port Authority, and said:

"We have held that similar bodies corporate created to act for the State in carrying out a public purpose are State agencies. (*Gaynor v. Marohn*, 268 N. Y. 417, and cases there cited.) We find that the corporate body here created is such an agency of the State. Indeed, in the opinion by Crane, Ch. J., in the cited case, the statute now challenged is included in a list of statutes which have created municipal corporations or districts to carry out a governmental power." *Buffalo and Fort Erie Public Bridge Authority v. Davis*, decided March 8, 1938.

The accuracy of the legislative descriptions of the Port Authority is borne out by the many attributes of sovereignty with which the States have invested it—attributes of sovereignty possessed only by States themselves or their direct governmental instrumentalities.

¹ Compact, Art. III (Stip. Ex. E, p. 18); Comp. Plan (Stip. Ex. E, pp. 30, 33); Chapter 64, Laws of New Jersey, 1927 (Stip. Ex. E, p. 185); Section 1, Chapter 277, Laws of New Jersey, 1927 (Stip. Ex. E, p. 203); Section 1, Chapter 421, Laws of New York, 1930 (Stip. Ex. E, p. 233); Section 1, Chapter 247, Laws of New Jersey, 1930 (Stip. Ex. E, p. 251); Section 4, Chapter 700, Laws of New York, 1933 (Stip. Ex. E, p. 334); Resolution of the Senate of the State of New York of March 7, 1935 (Supplement to Stip. Ex. E, p. 19); New York Concurrent Resolution of February 2, 1931 (Stip. Ex. E, p. 262); New Jersey Joint Resolution of February 2, 1931 (Stip. Ex. E, p. 258).

In the first place, the Commissioners who compose the Port Authority are "chosen by the *State of New York* and * * * by the *State of New Jersey*." Initially, your Amicus, the State of New Jersey, actually appointed its Commissioners by public act which named them specifically (Chap. 152, Laws of New Jersey, 1921). When the number of Commissioners was increased, your Amicus, the State of New York, similarly appointed the additional members. At the present time the Legislatures have delegated their power of appointment to the highest executive officer of each State with the advice and consent of his respective Senate¹ (Rec. f. 67).

New Jersey Commissioners of the Port Authority can only be removed "upon charges and after a hearing by the Senate," and New York Commissioners may be removed only "upon charges and after a hearing by the Governor of the State." As in the case of all servants of the two States, the Commissioners and their employees take an oath of office. The Commissioners' terms are fixed by statute (Rec. f. 67, 324). So, too, the States have by statute extended to the Port Authority's employees rights and privileges given only to employees of the States, such as membership in the State Retirement System.² (Rec. f. 69, 323).

The two States have by law decided that the Port Authority may maintain a police force and have designated the members of this police force as peace officers of both States,

¹ Sec. 6, Chap. 422, Laws of New York, 1930 (Stip. Ex. E, p. 238) and Sec. 2, Chap. 245, Laws of New Jersey, 1930 (Stip. Ex. E, p. 249).

² Chap. 259, Laws of New York, 1935 (Supplement to Stip. Ex. E, p. 21).

along with municipal policemen, sheriffs, constables and other law enforcement officers (Rec. f. 54, 325).

Aside from this status of the officers and employees of the Port Authority, the integration of the Authority with the political and governmental systems of the two States, appears from the method of official action which they have prescribed for it. Article XVI of the Compact, reserves to each State the right "to provide by law for the exercise of a veto power by the Governor thereof over any action of any Commissioner appointed therefrom." And pursuant to this reservation, they have delegated such a veto power to their respective Governors.¹ (Rec. f. 67, 323).

The direct control the States have reserved over their agency is emphasized also by the requirement that the Authority must report annually to the Legislatures and Governors of both States and that it must so report also at such other times as required so to do (Compact Art. VII; Rec. f. 324).

In Point IV, we shall review the States' direct control of all of the revenues of the Port Authority and their reservation of the right to direct their disposal, their advances of over eighteen million dollars, and their outright appropriations of almost three million dollars in aid of the port development program.

Fee title to the Holland Tunnel is held directly by the two States, the Port Authority's agency being limited to operation and maintenance. Indeed, such title as the Port Authority has to all of the other bridges, tunnels and terminals is strictly limited by its legal position as the agent

¹ Chapter 333, Laws of New Jersey, 1927 (Stip. Ex. E, p. 206) and Chapter 700, Laws of New York, 1927 (Stip. Ex. E, p. 208).

and trustee of the two States. Like any principals, the States are at all times free to dissolve the Port Authority and take over its properties directly. They would then hold outright title to all of their port projects—assets which the Government is here seeking to diminish.

The broad governmental powers which the States have vested in the Port Authority are only accorded to instrumentalities truly governmental. When, in Article XVIII of the Compact, the States authorized the Port Authority “to make suitable rules and regulations * * * for the improvement of the conduct of navigation and commerce, which when concurred in or authorized by the legislatures of both states, shall be binding and effective upon all persons and corporations affected thereby” (Rec. f. 63, 68, 325, 327), they invested the Port Authority with the most governmental of all functions—law-making.

Article XIX provides for the imposition of penalties for the violation of any such rule or regulation of the Port Authority. Pursuant to these sections, both States have ratified regulations of the Port Authority and made violations of them an integral part of the Criminal Law of both States. The Criminal Courts of both States are given jurisdiction to enforce the penalties provided (Chapter 599, Laws of New York, 1932; Stip. Ex. E, p. 320; Chapter 113, Laws of New Jersey, 1932; Stip. Ex. E, p. 321).

The significance of such power of the Port Authority was pointed out in *State v. Port of Astoria*, 79 Ore. 1, 154 Pac. 399. The Court said (at pp. 15, 16):

“It is true that ‘rules’ and ‘regulations’ are the terms employed; but the mere names are not conclusive, because the thing named is described in detail; and from the description the substance is known, and the thing

called a 'rule' or 'regulation' is, in fact, *an ordinance or a municipal law* carrying a fine or penalty or punishment for a violation. * * *

"The legislature has therefore viewed the port as a municipality; (a) By defining it to be a municipality; (b) by granting authority to exercise functions of government, to enact certain laws, and to provide fines, penalties and punishments for violations;" (Italics ours.)

Other regulatory powers which the States have granted to the Port Authority include the power to hold investigations in connection with matters pertaining to the planning and development of the Port of New York (Rec. f. 67, 327). For such purposes there is an express grant of jurisdiction of any and all persons residing in, or owning property within the enacting state, including power to issue subpoenas in connection with such jurisdiction (Rec. f. 67, 327). For failure to comply with such Port Authority subpoenas, the Supreme Court in New York may, upon application of the Port Authority, commit such offender to jail or otherwise punish him for contempt (Chapter 623, Laws of New York, 1924).

By the same legislation the State of New York provides that orders of the Port Authority, with respect to regulation or control of port affairs within its jurisdiction, are enforceable by mandamus or injunction, or any other relief appropriate to the case. Furthermore, actions and proceedings involving the Port Authority are entitled to a preference on the court's calendars "over all civil actions" (Rec. f. 68, 327).

Of significance likewise is the grant by both States of the power of eminent domain (Rec. f. 68) and the recognition that the Port Authority may change the grade of public high-

ways without liability for damage to the owners of abutting property (Chap. 186, Laws of New Jersey, 1935 [Supplement to Stip. Ex. E, p. 41] and Chap. 876, Laws of New York, 1935 [Supplement to Stip. Ex. E, p. 40]). Change of grade is *damnum absque injuria* only when done by a State governmental agency.

Another significant immunity of the Port Authority is its exemption, both by statute and by common law, from State and municipal taxation with respect to its property and the securities it issues (Rec. f. 68, 330). In *Bush Terminal Company v. The City of New York*, 152 N. Y. Misc. 144 (1934), the New York Supreme Court made clear that the immunity of Port Authority terminals, or any other facilities developed in pursuance of the Comprehensive Plan, followed as a matter of course from the municipal and governmental character of the Authority as an agency of the States. Similarly, the special appropriations made by the States for the initial support of the Port Authority (Rec. f. 63, 66, 309, 310), would have been unconstitutional if extended to a private corporation. (New York Constitution, Art. VIII, Sec. 9, and New Jersey Constitution, Art. I, Par. 20.)

It is stipulated (Rec. f. 342), and the Board below has found as a fact (Rec. f. 68):

"The Port Authority has no stock and no stockholders, and is not owned by any private persons or corporations. Its projects are all operated in the interest of the public, and no profits inure to the benefit of private persons."

As was said by the Supreme Court of Washington concerning the Port of Seattle in *Paine v. Port of Seattle*, 70 Wash. 294; 127 Pac. 580; 126 Pac. 628:

"The object of this incorporation is to provide public terminal facilities for both sea and land commerce, or, perhaps, better, to provide a place open to the entire public where sea and land traffic may meet for the purposes of exchange. This being its object, *we think it may be deemed a municipal corporation, * * **" (Italics ours).

And in *Alabama State Bridge Corporation v. Smith*, 217 Ala. 311, 315; 116 So. 695, the Supreme Court of Alabama said:

"It is intended to put into use and operation public funds and agencies of the states for the common benefit of the people of the state. It would construct bridges for the public use and, in the end, free to the public. It is an arm of the state, with none of the limitations, disabilities, or responsibilities that affect private corporations as such."

With all of these attributes bestowed upon it by the States, there would seem to be no escape from the conclusion that the Port Authority is indeed a direct governmental instrumentality of the two States, and of the two States alone. In reviewing them we have been mindful of this Court's statement in *James v. Dravo Contracting Co.*, 82 L. Ed. Adv. Ops. 125, 138:

"We said further that the nature of the governmental agencies or the mode of their constitution could not be disregarded in passing on the question of tax exemption, as it was obvious that an agency might be of such a character or so intimately connected with the exercise of a power or the performance of a duty by the one government 'that any taxation of it by the other would be such a direct interference with the functions of government itself as to be plainly beyond the taxing power.'"

But the government contends that congressional consent automatically destroys the sovereign character of any action

that the States may take by compact. In support of this extraordinary theory the Federal Government's brief refers to the memorandum filed by the United States Attorney General in *Hinderlider v. The LaPlata River and Cherry Creek Ditch Company*, No. 437, Present Term, and refers to the argument therein that a compact has the status of an Act of Congress (Petitioner's Brief, Point II). Your Amici ask, in turn, that the memorandum filed in the same case by the States of Delaware, Maryland, New Jersey and New York, The Port of New York Authority and the Delaware River Joint Commission (in which memorandum the States of Virginia and Oregon also joined), be considered here in refutation of that contention. Neither in that case (see Attorney General's memorandum dated February, 1938) nor in its brief here has the Government attempted to reply to the arguments and authorities in that memorandum of the States.

The constitutional provision requiring consent to an interstate compact has been described by the authorities as more in the nature of a quasi-judicial than a positive legislative function. Congress' power, in this respect, was to protect and to preserve rather than to create. The Government's comparisons all but suggest that the states' request to Congress for consent to an interstate compact should "be humbly addressed by both Governments for his Royal Approbation" (Brief, p. 49, footnote 21). Your Amici, under the impression that they are sovereign States, cannot concur in this analogy. On the contrary, the decisions of this Court would seem to be conclusive that the states' power to enter into compacts is in all respects the power of sovereign and independent states. *Rhode Island v. Massachusetts*, 12 Pet.

657, 725; *Poole v. Fleeger*, 11 Pet. 186, 209; *Story, Commentaries on the Constitution*, (5th Ed. 1891) Sections 1402, 1403.

Moreover, in the *Hinderlider* case, the question as to the nature of interstate compacts arose on a point of the appellate jurisdiction of this Court. Its application to the doctrine of immunity is not illuminating. The Board of Tax Appeals showed clearly why the argument based on Congressional consent was inapposite. It said (Rec. f. 74, 75):

"The argument is pressed that the immunity is lost when the activity of the state is one involving interstate commerce or navigation or is carried on under an interstate compact requiring Congressional consent. The argument is not new. It was considered and rejected in *Commissioner v. Harlan*, *supra*, and there is enough in the opinion and briefs in the *Ten Eyck* case to show that the Federal power over interstate commerce and navigation were not overlooked. * * * To this may be added that there is no reason to regard the revenue act as a means used by Congress to regulate interstate commerce, to control navigation, or as an implied condition of its consent to the interstate compact. * * * *It would mean that in making an interstate compact the states would be surrendering the very sovereignty which the Constitution takes for granted and upon which the compact is founded*—and this, not directly by an express condition in the resolution of consent, but by an implied relation between the general terms of the consent and the broad terms of the revenue act. Is it to be supposed that in the blanket consent to interstate compacts for crime prevention (USCA, title 18, § 420) lurks a power to tax the state police officers who are employed under the compact?" (Italics ours.)

Perhaps the Commissioner's error arises from his *incomplete* reading of the reason for the rule of immunity stated in *Helvering v. Powers*, 293 U. S. 214, 225. In the following

quotation from that case he has omitted the clause we now place in italics (Brief, p. 23) :

"That reason, as we have frequently said, is found in the necessary protection of the independence of the national and state governments *within their respective spheres under our Constitutional system.*" (Italics ours.)

The power to enter into interstate compacts, and the power to enter into fields of interstate commerce not preempted by Congress, *are beyond all question within the spheres of action reserved to our State Governments under our Constitutional system.* The Government's argument is predicated upon the supposition that immunity exists only where the States are exercising an unlimited sovereignty. But in the American system of dual sovereignty, neither the state nor the federal governments possess unlimited sovereignty.

The Government's contention in this matter of Congressional consent will not stand analysis or application. Thus, if we follow out their theory, only the original thirteen states could be within the doctrine of *Collector v. Day*—because the consent of Congress was required as a condition precedent to the admission of each of the other states to the Union!

If the Government is correct in its theory, that the consent of Congress has the effect of rendering taxable the subject of a compact, then for all practical purposes the compactual method is useless to the states. This Court is well aware of the wide and salutary use of the compacting power which the states have increasingly employed—interstate bridges and highways, sanitation, conservation, water supply, irrigation, joint police activity, return of parolees.

and many others. The use of compacts in these governmental efforts has been directly encouraged by this Court. We are confident that the Court will not look favorably upon this attempt to paralyze that use.

POINT IV.

Taxation of the Port Authority would be a direct burden on the States of New York and New Jersey.

The States of New York and New Jersey have a very substantial interest in the outcome of this litigation. Federal taxation of the Port Authority would impose a direct monetary burden upon those two States. It would be a burden so real that, unless the States appropriated an amount equivalent to the tax, the Port Authority would ultimately be destroyed. Each of your Amici would be subjected to similar burdens should their bridge, highway and waterway developments be held subject to Federal taxation.

The Port Authority was created and went forward with its financing upon the normal assumption of tax immunity. That this assumption was altogether justified would appear from the recitals of the Legislatures in creating the Port Authority (Rec. f. 331, 332), of Congress in consenting to the Compact (Rec. f. 331), of every court that has passed upon the question during the past decade,¹ and of the eminent

¹ *Commissioner v. Ten Eyck*, 76 F. (2d) 515, C. C. A. 2nd; *Commissioner v. Harlan*, 80 F. (2d) 660, C. C. A. 9th; *Commissioner v. Gerhardt*, 92 F. (2d) 999, C. C. A. 2nd, (the instant case below); *Halsey v. Helvering*, 75 F. (2d) 234, U. S. Ct. App. D. C.; *Jamestown & Newport Ferry Co. v. Commissioner*, 41 F. (2d) 920, C. C. A. 1st; *Boomer v. Glenn*, 21 F. Supp. 766; *United States v. King*

counsel who have considered the question. The Honorable Charles Evans Hughes, in an opinion written on November 10, 1925, said that this immunity of the Port Authority as a governmental instrumentality was "fully warranted by the nature of the functions of the port authority and of the purposes for which it has been established."¹

The Government disclosed its ultimate intention to reach the income of the bonds of the Port Authority by expressly denying their immunity in the Stipulation (Rec. f. 311). More forcibly, they now proclaim their intention to reach the *revenues* of the Port Authority. The Government's Brief, after referring to the *gross revenues* of the Port Authority, says (p. 47) :

"Certainly, to hold the Authority and its employees subject to Federal taxation would not serve to destroy that independence of the States * * *." (*Italics ours.*)

County, Washington, 281 Fed. 686; *Moisseiff v. Commissioner*, 21 B. T. A. 515; *Carey v. Commissioner*, 31 B. T. A. 839; *Case v. Commissioner*, 34 B. T. A. 1229 (the instant case below); *Fitzgerald v. Commissioner*, 29 B. T. A. 1113; *Modjeski v. Commissioner*, 28 B. T. A. 1051; *Harlan v. Commissioner*, 30 B. T. A. 804; *Wait v. Commissioner*, 35 B. T. A. 359; *Platt v. Commissioner*, 35 B. T. A. 472.

¹ In passing upon the nature of a bridge and highway development authority of your Amicus, the State of California, the Supreme Court of that State commented upon and applied the reasoning of this opinion, saying:

"By agreement of the two states, the legality of such an organization as the Port Authority, and the validity of its bonds, was submitted to the Honorable Charles Evans Hughes, then practicing law in New York, and now the chief justice of the Supreme Court of the United States. * * * While the opinion of the learned chief justice does not have the force of judicial precedent, it does express the opinion of a very distinguished lawyer and an eminent jurist." *In Re California Toll Bridge Authority*, 212 Cal. 298, 303.

It is clear, therefore, that the tax upon employees is but the first step in the program of the Treasury Department which the Court is now asked to sanction. In the case of the Port Authority, of course, this is an attempt to tax the revenues of the States themselves. The Government says (Brief, p. 31) that the Port Authority

“revenues belong to it alone, subject to an unexercised power in the States to direct the disposition of surplus revenues.”

This is not the fact. Port Authority revenues are expendable only for such purposes as the two States themselves may direct. By statutes concurrently enacted, the States have detailed the exact public purposes to which Port Authority income may be devoted.¹ These revenues are the revenues of the two States—and, as we shall show, *the power to direct their disposition has been repeatedly exercised.* The Government's brief does not adequately disclose the nature of these revenues. The direction to pledge revenues to secure the bonds issued by the Port Authority is a direction by the two States.² The direction to pool these revenues is a direction by the two States,³ and finally, it is clear that revenues

¹ This is done by Chap. 48, Laws of New York, 1931, and Chap. 5, Laws of New Jersey, 1931, “Regulating the use of revenues received by the Port of New York Authority”, (Stip. Ex. E, pp. 282, 306). By Section 2 of this legislation, the States have directed that “Any surplus revenues . . . shall be used for such purposes as may hereafter be directed by the said two states” (See also Stip. Ex. K, Rec. f. 311).

² Section 3, Chapter 37, Laws of New Jersey, 1925; Section 3, Chapter 210, Laws of New York, 1925; Section 3, Chapter 6, Laws of New Jersey, 1926; Section 3, Chapter 761, Laws of New York, 1926; Section 3, Chapter 3, Laws of New Jersey, 1927; Section 3, Chapter 300, Laws of New York, 1927.

³ Section 4, Chapter 4, Laws of New Jersey, 1931; Section 4, Chapter 47, Laws of New York, 1931.

remaining after fulfillment of all other obligations are to be used for such purposes as may be "directed by the two states."¹

The way in which the States financed these facilities makes it clear that the revenues which the Government is seeking to reach are nothing less than the *revenues of the two States*. When the States undertook to build the Holland Tunnel, each was faced with the problem of its cost. The Holland Tunnel Compact provided that the cost of the tunnel was to be paid one-half by each of the States (Stip. Ex. H, p. 4). The State of New Jersey elected to finance its half of the cost through State bond issues. Such bond issues for \$36,000,000. were authorized in New Jersey, after State referenda, "for the purpose of paying the cost of extending the system of State highways by the construction of bridges and tunnels for vehicular or other traffic across the Delaware and Hudson rivers." (Stip. Ex. H, pp. 101, 111, 126, 137.) Accordingly, New Jersey, New York and Pennsylvania treated the Holland Tunnel and the Camden Bridge as integrated parts of their state highway systems. By the Constitution of New Jersey, the financing Act had to provide the ways and means of liquidating the State's debt. (New Jersey Constitution, Article IV, Section VI, par. 4.) In the case of the Holland Tunnel, this constitutional requirement was to be fulfilled by the collection of tolls. The statute provided that revenues "shall be paid into the sinking fund for the payment of interest and for amortizing bonds issued hereunder." (Stip. Ex. H, p. 134.)

On the other hand, New York elected to pay its half of the cost of the Holland Tunnel out of annual state appro-

¹ Chapter 5, Laws of New Jersey, 1931; Chapter 48, Laws of New York, 1931; Stip. Ex. K.

priations (Rec. f. 303), to be reimbursed out of the revenues to be derived from tolls. (There was nothing new in this method of reimbursement—in 1883 New York opened the Brooklyn bridge on a toll basis and continued to operate it on that basis for twenty-eight years. See *People v. Kelly*, 76 N. Y. 475, 484, 488.) These joint projects of your Amici, the States of New York, New Jersey and Pennsylvania, were planned in line with the fiscal policies of all three States, in the confident belief that the States had the right to charge tolls without subjecting themselves to the burden of Federal taxation, just as freely as the Federal Government charges the users of its postal services. Your Amici, the States of New York and New Jersey, have, ever since that time, assumed not only that they had the sovereign power to create these facilities, not only that they had the power to charge for their use, but also that they had the right to dispose of their revenues, free from Federal tax interference. When the State of New York wished to finance further interstate crossings, it chose to direct that the tolls which it was receiving from the operation of the Holland Tunnel should be turned over to its other agency, the Port Authority, to be used in the building of the Staten Island Bridges and the George Washington Bridge, in the amount of over \$9,000,000.¹ New Jersey advanced an equivalent sum directly from its Treasury.²

¹ Section 1, Chapter 761, Laws of New York, 1926; Section 1, Chapter 300, Laws of New York, 1927; Section 1, Chapter 364, Laws of New York, 1928; Section 1, Chapter 119, Laws of New York, 1929; Stip. Ex. E, pp. 168, 187, 212 and 220.

² Section 1, Chapter 37, Laws of New Jersey, 1925; Section 1, Chapter 6, Laws of New Jersey, 1926; Section 1, Chapter 3, Laws of New Jersey, 1927; Stip. Ex. E, pp. 100, 147, 177.

Again, when in 1931 the States of New York and New Jersey found themselves confronted with the necessity of providing large funds for relief and other emergency expenditures, having found that the Holland Tunnel was a successful project, they exercised their sovereign powers over their own revenues by further directions to their Commissioners. They directed their agency, the Port Authority, to raise \$50,000,000, the cost of the Holland Tunnel, and to pledge the revenues of the Holland Tunnel as security for a bond issue in that amount. They further directed their agency, the Port Authority, upon receipt of these funds to turn the sum of \$25,000,000 into the Treasury of each State. (Chapter 4, Laws of New Jersey, 1931; Chapter 47, Laws of New York, 1931; Stip. Ex. E, pp. 264, 287.)

Under New Jersey statutes, since her half of the revenues were already pledged to the State bond issue, the lien of the bondholders on the new Port Authority Holland Tunnel issue, would have been technically only a second lien on the New Jersey half of the Holland Tunnel revenues. But to meet this situation New Jersey undertook to turn into its own Sinking Funds on the original State bond issue, an amount sufficient in each year, to make good the obligations on those original bonds (Section 6, Chapter 4, Laws of New Jersey, 1931; Stip. Ex. E, p. 269).

Again, when the States of New York and New Jersey determined upon the policy of building an additional vehicular tunnel under the Hudson River (the present Lincoln Tunnel), they directed the pooling of the revenues of all of their joint facilities operated by the Port Authority, including the Holland Tunnel. The States' direction as to the pooling of these revenues from interstate bridges and tunnels now furnishes the basic security for the obligations issued for the

construction of the Lincoln Tunnel. It is obligations of this character, supported by these revenues, which were delivered to the Federal Government in 1933 under the Loan Agreement of ~~September 18, 1933~~ ^{March 18, 1933}. (Stip. Rec. f. 312, 313.)

Throughout this entire history, not a single Federal or State officer having to do with these transactions, not a single court passing upon the nature of the Port Authority, has ever regarded the revenues from these facilities as anything else but revenues belonging to the two States, to which they are entitled and over which they may and do freely exercise their control in accordance with their own fiscal policies. It is now insisted that these are revenues which the Federal Government may treat as taxable. The Government takes the position that, even if these revenues never passed through the conduit of the Port Authority, but went directly into the Treasuries of the States, they would still be taxable. In short, the Government insists that it may dip into the Treasuries of the States and take out whatever is required for the uses of the Federal Government. This is part and parcel of the same argument which would destroy the power of each State to deal with its neighbor by compact in a matter of joint concern and would destroy the power of the State to select such agencies and instrumentalities as it requires for its governmental purposes. The Government says (Brief, p. 43) :

"But perhaps the most decisive element of the case is the large volume of revenues which would be carved out of the field of Federal revenue sources *if the Port Authority and its employees were held exempt from Federal taxation.*" (Italics ours.)

What the Commissioner is really seeking to do is to carve out of the field of *State* revenues, new sources of taxation

for the Federal Government. The Port Authority's revenues must be deemed to be revenues of the States themselves. Never before in the history of this Court has there been such a flagrant attempt to appropriate the properties of the States.

The Government says (Brief, p. 47) that taxation in these cases "would not serve to destroy that independence of the States of New York and New Jersey". Are the States to wait until they are on the edge of actual destruction to be entitled to the support of this Court in the protection of their independence? We can find no decision of this Court, old or new, which holds that it is necessary to show that the imposition of the tax will *destroy* the independence of the States in order to sustain their immunity. It is enough if the tax constitutes an interference with the exercise of the State's governmental functions.

In addition to the bond issues, the directions as to the disposition of revenues, and the outright appropriation of almost three million dollars to the projects of the Port Authority, your Amici, the States of New York and New Jersey, have also advanced over eighteen million dollars in aid of the port construction program of the Port Authority (Rec. f. 310). The States directed that the Port Authority was to return these advances whenever the projects earned a net income over and above all operating expenses and all charges by way of interest and amortization upon outstanding bonds (Rec. f. 64, 310). It was calculated that the return of this eighteen million dollars to the States would begin in about fifteen years. The tax burden which the Government seeks to impose in these cases would obviously increase the operating expenses of the Port Authority and would, therefore, either indefinitely postpone or else forever prevent the return of these advances to the States. Further-

more, the two States have, under Article XV of the Compact, obligated themselves to continue \$100,000 each annually until such time as the Port Authority should become self-sustaining (Rec. f. 325). Although such objective was recently reached, the imposition of a Federal tax burden might necessitate the immediate resumption of these annual payments.

In 1935, the States found themselves pressed with the need for funds with which to meet new burdens, especially the obligation to furnish relief. The insulation of the States' revenues in the hands of the Port Authority, their corporate agency, enabled the States to agree upon a plan of accelerating the return of these advances. Accordingly, in 1935 they availed themselves of the credit of the Port Authority to put into the treasury of New Jersey the sum of \$2,500,000. In 1938, through the same method, over \$2,700,000 will be taken into the treasury of the State of New York. (Chap. 165, Laws of New Jersey, 1935; Chap. 293, Laws of New York, 1935). This means that the States receive the present worth of state income which would ordinarily not be realized for a long period of years. This fiscal program is carried out by the delivery of Port Authority bonds to the State Treasuries. These bonds will ultimately be paid out of the revenues collected from the users of the interstate bridges and tunnels. It is these revenues which the Federal Government now seeks to tax.

In addition, the States of New York and New Jersey hold \$17,444,000 of Port Authority bonds in their own treasuries, part of it in the State Retirement Fund, which is the pension system for State and Municipal employees.

From all of the foregoing facts it is obvious that the burden in these cases would be exactly the same as the burden

that was sought to be imposed upon the United States in *New York ex rel. Rogers v. Graves*, 299 U. S. 401, of which a brief of the Office of the Attorney General of the United States¹ has recently said:

"Therefore, in that case a burden would have been imposed upon the Federal Government had the state tax been allowed, because the source of the general counsel's salary in that case was partially, if not entirely from funds collected by the railroad from the Federal Government as charges for services rendered to it, *and from funds which would otherwise inure to the benefit of the Federal Government.*" (Italics ours.)

The foregoing facts prove to a demonstration the direct burden that would be imposed on the States by the tax urged here by the Federal Government. We have shown that the functions of the Port Authority are clearly governmental.

"If so, its operations are immune from federal taxation and, as a necessary corollary, 'fixed salaries and compensation paid to its officers and employees in their capacity as such are likewise immune'. *New York ex rel. Rogers v. Graves*, 299 U. S. 401." *Brush v. Commissioner*, 300 U. S. 352, 360.

Conclusion.

Your Amici, the States other than New York, New Jersey and California, have refrained from setting forth special situations in their own States to which the contentions of the Government are equally applicable. To do so would have unduly lengthened this presentation.

The compelling interests which bring the States here include the protection of their sovereignties from Federal

¹ Brief submitted by the Office of the Attorney General of the United States, in *Freedman v. Commissioner*, 92 F. (2d) 150, at page 31 of that Brief.

usurpation; the safeguarding of the method of interstate compacts for the solution of problems transcending state borders; the avoidance of interstate conflict; the protection of the power of the States to control and dispose of their own properties and revenues; the preservation of the financial stake of the States in their port, bridge and highway developments; the preservation of the Authority form of governmental enterprise; and the protection, not only of themselves, but of all their many political subdivisions and municipal corporations, from the burden of Federal taxation.

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Dated: March, 1938.

**SEPARATE CONCURRING MEMORANDUM SUBMITTED ON
BEHALF OF THE STATE OF CALIFORNIA.**

In view of the fact that in California the development of the harbor, port and waterway facilities, particularly in relation to the Bay of San Francisco, is a State function accomplished through *State* revenues and by statutory officers, the State of California is seriously alarmed at the effort of the Commissioner of Internal Revenue to collect a Federal Income Tax from employees of The Port of New York Authority.

As we understand his contention, it is that the employees of the Port Authority are taxable notwithstanding the fact that the Port Authority exists in municipal corporate form as the representative of the States of New York and New Jersey, the theory being that its activities are in nature proprietary and not essentially governmental.

The Board of Tax Appeals in *Platt v. Commissioner*, 35 B. T. A. 472 (1937), held immune the salaries of the members of the Board of State Harbor Commissioners of California.

In *Commissioner v. Harlan*, 80 Fed. (2d) 660, the court granted immunity to the attorney for the Golden Gate Bridge and Highway District.

The Commissioner has apparently for the present acquiesced in these decisions for he did not prosecute appeals therefrom. In fact, the Secretary of the California Board of State Harbor Commissioners received on August 6, 1937 the following letter from the Bureau of Internal Revenue:

"You are advised that after careful consideration it is held that the compensation paid to you by the Board of State Harbor Commissioners of the State of California is immune from Federal Income Taxes."

However, and in spite of the present acquiescence on the part of the Bureau of Internal Revenue, we feel that there is no assurance that the Bureau will in the future continue to recognize the fundamental doctrine of reciprocal immunity. The experience of the Port Authority has forced us to expect the possibility of future attacks by the Bureau. It is with this thought that we have joined in this *Amici Curiae* brief with the hope that this Court, with the position of the State of California along with other states clearly presented for consideration, will definitely settle this fundamental states' rights problem.

I. HARBOR DEVELOPMENT AND OPERATION IN THE STATE OF CALIFORNIA.

The State of California operates the Harbor of San Francisco and San Diego Harbor by and through Boards of State Harbor Commissioners for those harbors respectively, and operates the Eureka Harbor by and through the Department of Public Works of the State of California.

California is particularly concerned about the case at bar because the question at issue is very similar to that which was involved in attempts which have heretofore been made by the Commissioner of Internal Revenue of the United States to collect income taxes from members of the Board of State Harbor Commissioners for San Francisco Harbor and the employees of said Board.

Said Board of State Harbor Commissioners for San Francisco Harbor and its predecessors have been since about the year 1863 an agency of said State of California created by law and vested by law with jurisdiction and control over waterfront property owned by said state and located in the City and County of San Francisco and over that portion of

the Bay of San Francisco within an area defined by law and generally lying along the easterly and northerly lines of said city and county, and the improvements, rights, privileges, easements and appurtenances connected therewith, said jurisdiction and control being for the purpose of maintaining and developing San Francisco Harbor and maintaining, developing and operating terminal facilities thereof.

The duties of said Board are those prescribed by Sections 1690 to 3231 of Part I, Division VI of the Harbors and Navigation Code of said State.

The members of said Board of State Harbor Commissioners are appointed by the Governor of the State of California and serve during his pleasure, and all the powers and duties of said Board are essentially governmental in character and such as are usually and traditionally a part of governmental functioning. The San Francisco Harbor has been developed and all of its facilities supplied and constructed under the present Board and its predecessors.

II. GOVERNMENTAL NECESSITY FOR THE CREATION OF THE BOARD OF STATE HARBOR COMMISSIONS FOR SAN FRANCISCO HARBOR.

The Board of State Harbor Commissioners for San Francisco Harbor exercises jurisdiction and control over a strip of waterfront land in the City and County of San Francisco bordering on tidewater in San Francisco Bay and of a certain part of the bay itself. Both the lands bordering the water and the adjacent lands submerged by the waters of the bay are integral parts of the harbor and their management and control by a single agency are necessary for the efficient and safe transportation of persons and property in

and out of the City and County of San Francisco and the territory of the State tributary to said city and harbor.

These lands along the waterfront, from the time of the admission of the State into the Union, have been sovereign lands of the State. The efficient operation of the harbor requires control over all of these lands under one agency in order that all of the facilities of the harbor may be integrated and the different activities thereof harmonized. Without such integration and unity of control the waterfront lands and harbor facilities could not be utilized so as to furnish the best possible service to the public at a fair price. Such unified control is also necessary in order that adequate facilities to accommodate the commerce of the port may be supplied when and as needed. The history of the port has shown the necessity for state ownership and control and for the furnishing of credit by the state in order to properly develop the harbor.

Public control of the harbor is also required in order that the waterfront shall be properly policed and that regulations concerning the movement of vessels to and from piers and slips and along the waterfront shall be properly regulated. Such public control is also required in order that safe and proper landings may be constructed and that rules shall be made and enforced regarding the landing of goods and the conditions under which they may remain upon wharves.

In this connection it may be further stated that the efficient operation of the harbor has required the construction and maintenance of a street paralleling the bay along the entire waterfront and located on lands belonging to the state. Only a public agency would have the necessary power, including the power of eminent domain, to open and maintain such a street and regulate the traffic thereon.

III. THE BOARD OF STATE HARBOR COMMISSIONERS IS AN INSTRUMENTALITY OF THE STATE OF CALIFORNIA ENGAGED IN THE PERFORMANCE OF A USUAL AND TRADITIONAL GOVERNMENTAL FUNCTION.

That the Board of State Harbor Commissioners is an instrumentality of the State of California is evident from the fact that the state has not seen fit to create any intervening political subdivision, authority or corporate body through which to effect its purposes with respect to San Francisco Harbor. The Board of State Harbor Commissioners is the State of California itself, operating through the state's directly appointed officers. Indicia of the status of the Board as a state instrumentality are the following:

The Board is required to render a biennial report to the Governor of the State; it has the power of appointment of officers and employees of the state; it has possession and control over the area of the port of San Francisco, owned by the state; officers and employees of the Board are members of the State Civil Service System and of the Employees' Retirement System of the State of California; the revenues of the Board must be deposited monthly in the state treasury and are subject to budgetary laws, and must be used pursuant to legislative appropriation; contracts of the Board must be made in a manner prescribed by law; failure to comply with the rules of the Board is a misdemeanor; bonded indebtedness for the work of the Board is incurred through general obligation bonds of the State of California (Harbors and Navigation Code, Chapter 368, California Statutes 1937).

That the Board is a state instrumentality engaged in performing governmental functions has been recognized in

United States v. State of California, 297 U. S. 175, 184; *Sherman v. United States*, 282 U. S. 25, 29. In *Taylor v. Spear*, 196 Cal. 709, 715, the court referred to the Board as "one of the state agencies of the State of California". See also *Denning v. State*, 123 Cal. 316, 321, on the same point.

It was specifically held in *Platt v. Commissioner*, 35 B. T. A. 472 (1937) that the Board of State Harbor Commissioners of California is engaged in the performance of a usual governmental function and that the salaries of the members of the Board and its employees are immune from federal taxation.

A partial enumeration of the powers of a governmental nature exercised by the Board are as follows: It has powers relating to landing and loading of merchandise; constructing wharves and improvements; making repairs; assigning berths and slips to vessels; building a sea wall and dredging; providing harbor police and making quarantine regulations; extending streets and establishing thoroughfares; exercising the power of eminent domain; providing a location for a public market; locating and constructing public dry docks; locating docks for federal use; operating a State Belt Railroad; providing a location for air ports; contracting for and using fire boats; removing obstructions to commerce and navigation; mapping waterfront changes; making rules and regulations for the commerce of the port.

In exercising its governmental activities the Board has installed in excess of fifty navigation signals, including lights, sirens, and bells, while the Federal Government has installed only one, within the pier head line. The Board has not only maintained a thoroughfare along the whole waterfront called the Embarcadero but has constructed a tunnel along and under the same for the improvement of traffic in

front of the ferry depot, and has under statutory provision purchased property for the straightening of the lines of said street.

That the Board is not acting in a proprietary capacity is shown by the statutory requirement (Section 3084, Harbors and Navigation Code) that a greater amount of money shall not, in the main, be collected pursuant to the terms of said Code than is necessary to enable the Board of State Harbor Commissioners to perform the duties required, exercise its authorized powers, and provide for interest and redemption requirements for bonds issued for any of the harbor purposes. This statutory policy has been followed continuously by the Board.

This statutory restriction upon revenues is clearly designed in the interest of the public for the establishment of port charges as low as the operation of the harbor will permit and, in fact, has resulted in the establishment at said Harbor of San Francisco of exceedingly low port charges.

IV. GOVERNMENTS HAVE UNIVERSALLY EXERCISED THE FUNCTION OF DEVELOPING AND OPERATING THEIR PORTS AND HARBORS.

There is no need to supplement the arguments in the briefs submitted by Respondents and Amici Curiae as to the necessity for governmental control of harbors. Neither would it serve any purpose to add to what the Circuit Court of Appeals said in *Commissioner v. Ten Eyck*, 76 Fed. (2d) 515, 517, 518, as to the history of port development and operation in this and other countries. We simply state that we concur in these arguments and rely upon them.

We conclude that according to constitutional principles long established and many times reaffirmed, The Port of New

York Authority and its employees are engaged in essential, usual and traditional governmental functions of the States of New York and New Jersey and are immune from federal taxation, and that in accordance with the same principles, the State of California and its employees, as owner and operator of the Harbor of San Francisco and of all of the facilities of said harbor are engaged in essential, usual and traditional governmental functions and are immune from federal taxation.

Respectfully submitted,

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